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No. 92-253

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ILLINOIS DEPARTMENT OF CORRECTIONS,
Petitioner,

v.

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WASHINGTON, D.C. 20543

MARVIN FLOWERS,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	PAGE
ARGUMENT	1
I. THE PETITION FOR CERTIORARI ACCURATELY PORTRAYS THE SIGNIFICANCE OF THE DECISION BELOW	1
II. THE FIRST QUESTION PRESENTED IN THE PETITION FOR CERTIORARI WAS AMPLY PRESERVED IN THE LOWER COURTS	4
III. THE LAW PERMITS THE DEPARTMENT TO RAISE THE FIRST QUESTION PRESENTED IN THE PETITION FOR CERTIORARI EVEN THOUGH THE ISSUE WAS NOT RAISED IN EARLIER CASES	5
CONCLUSION	9

TABLE OF AUTHORITIES

CASES	PAGE(S)
Beck v. Alabama, 447 U.S. 625 (1980)	4
Engle v. Isaac, 456 U.S. 107 (1982)	4
Falconer v. Lane, 905 F.2d 1129 (7th Cir. 1990)	4, 5
Flowers v. Illinois Dep't of Corrections, 962 F.2d 703 (7th Cir. 1992)	3
Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962)	6
Martin v. Ohio, 480 U.S. 228 (1987)	4

Mercoid Corp. v. Mid-Continent Inv. Co., 320 U.S. 661 (1944) 6

Patterson v. New York, 432 U.S. 197 (1977) ... 4

Penry v. Lynaugh, 492 U.S. 302 (1989) 7, 8

Sawyer v. Smith, 110 S. Ct. 2822 (1990) 4, 8-9

Taylor v. Gilmore, 954 F.2d 441 (7th Cir.), *petition for cert. filed*, 60 U.S.L.W. 3783 (May 19, 1992) (No. 91-1738) ..... *passim*

Teague v. Lane, 489 U.S. 288 (1989) ..... *passim*

Wade v. United States, 112 S. Ct. 1840 (1992) ... 7

In re Winship, 397 U.S. 358 (1970) 8

MISCELLANY

ILLINOIS SUP. CT. COMM. ON PATTERN JURY INSTRUCTIONS IN CRIMINAL CASES, ILLINOIS PATTERN JURY INSTRUCTIONS—CRIMINAL (1968) 2

ILLINOIS SUP. CT. COMM. ON PATTERN JURY INSTRUCTIONS IN CRIMINAL CASES, ILLINOIS PATTERN JURY INSTRUCTIONS—CRIMINAL (2d ed. 1981) 2

JAMES W. MOORE, JO D. LUCAS & THOMAS S. CURRIER, MOORE'S FEDERAL PRACTICE (2d ed. 1991) 6

UNITED STATES DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1988 (1989) ... 3

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ARGUMENT

I.

THE PETITION FOR CERTIORARI ACCURATELY PORTRAYS THE SIGNIFICANCE OF THE DECISION BELOW.

Despite Flowers's contention to the contrary, the decision below and *Taylor v. Gilmore*, 954 F.2d 441 (7th Cir.), *petition for cert. filed*, 60 U.S.L.W. 3783 (May 19, 1992) (No. 91-1738), will indeed have momentous consequences for Illinois and the nation.

First, Flowers asserts that these decisions will not likely affect hundreds of murder convictions because the pattern instructions required the allegedly unconstitutional jury charge only between 1981 and 1987. Flowers fails to note, however, that the pattern instructions in existence from 1968 through 1981 also permitted the same error to occur. In the first edition of the pattern instructions, published in 1968, instruction 7.02 governed murder charges and instruction 7.06 governed the type of voluntary manslaughter relevant to this case. ILLINOIS SUP. CT. COMM. ON PATTERN JURY INSTRUCTIONS IN CRIMINAL CASES, ILLINOIS PATTERN JURY INSTRUCTIONS—CRIMINAL Instructions 7.02 & 7.06 (1968) (hereafter "I.P.I. CRIMINAL—1ST ED."). If a court used these two instructions, as Flowers's state trial judge did, then the *Reddick* problem would occur because instruction 7.02 did not state that the prosecution had to prove the absence of voluntary manslaughter.

Instruction 27.01, also appearing in the first edition of the pattern instructions, would have avoided the *Reddick* problem because it included the absence of voluntary manslaughter as a factor that the prosecution had to prove beyond a reasonable doubt. I.P.I. CRIMINAL—1ST ED. Instruction 27.01. The second edition of the pattern instructions (published in 1981) eliminated the absence-of-manslaughter language of instruction 27.01, however, thereby effectively guaranteeing a *Reddick* problem whenever a court used the pattern instructions. ILLINOIS SUP. CT. COMM. ON PATTERN JURY INSTRUCTIONS IN CRIMINAL CASES, ILLINOIS PATTERN JURY INSTRUCTIONS—CRIMINAL Instruction 27.01 (2d ed. 1981).

Moreover, between 1968 and 1981, parties frequently overlooked instruction 27.01 and offered instructions at trial based on instructions 7.02 and 7.06 instead. This very case presents a conspicuous example; as Judge Easter-

brook noted below, Flowers "was tried in 1980, but many judges used [the faulty] instructions before the formula was enshrined in the pattern book." *Flowers v. Illinois Dep't of Corrections*, 962 F.2d 703, 708 (7th Cir. 1992) (Easterbrook, J., concurring) (App. 9).

Flowers also suggests that *Taylor* and the decision below will affect only an insignificant number of murder convictions entered between 1981 and 1988. Brief in Opposition, pp. 4-5. Statistical evidence suggests that the opposite is true. In 1986 and 1987 alone, there were 1,465 murder and non-negligent manslaughter offenses known to the police in Chicago, Peoria and Springfield, Illinois. UNITED STATES DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1988 Table 3.119, at 440-44 (1989). If only five percent of these crimes led to convictions on jury verdicts after pattern charges on murder and voluntary manslaughter, more than seventy-three prisoners could potentially have colorable federal habeas corpus claims from these two years alone. Extrapolating back to 1968 and considering that murders occurred in Illinois outside these three cities, a very real chance indeed exists that *Taylor* and the decision below will affect hundreds of final murder convictions.

Finally, the decisions have national implications for two reasons. First, the new rule analysis of *Teague v. Lane*, 489 U.S. 288 (1989), applies to every state habeas proceeding in the federal courts. The Seventh Circuit's severe restriction in *Taylor* of the scope of that analysis will likely encourage other courts to take a similarly cavalier approach to the new-rule inquiry. Second, *Taylor* effectively holds, in explaining its new-rule decision, that criminal defendants have a Due Process right to have a jury consider evidence relating to an affirmative defense. 954 F.2d at 453. This Court essentially reserved the question of

whether the Due Process Clause extends that far in *Beck v. Alabama*, 447 U.S. 625 (1980). *See id.* at 637. Because a circuit split exists on this fundamental question of criminal procedure, the decision presents a national issue.

II.

THE FIRST QUESTION PRESENTED IN THE PETITION FOR CERTIORARI WAS AMPLY PRESERVED IN THE LOWER COURTS.

Flowers asserts that the Department did not preserve below the Petition's first question presented because the Department conceded that the pattern jury instructions violated the Constitution. The first question presented, however, does not raise the constitutionality of the instructions. Rather, it asks the Court to decide whether *Falconer v. Lane*, 905 F.2d 1129 (7th Cir. 1990), which (as modified by *Taylor*) radically expanded an already controversial proposition on a fundamental aspect of criminal procedure, applies retroactively. Contrary to Flowers's argument, the Petition points to a circuit split only as evidence that "reasonable jurists may disagree" over the constitutionality of the instructions and that therefore *Falconer* and *Taylor* announced a new rule under *Teague. Sawyer v. Smith*, 110 S. Ct. 2822, 2827 (1990).

On the merits of the issue of whether *Falconer* and *Taylor* are consistent with *Patterson v. New York*, 432 U.S. 197 (1977); *Engle v. Isaac*, 456 U.S. 107 (1982); and *Martin v. Ohio*, 480 U.S. 228 (1987), Flowers attempts to distinguish those latter cases, arguing that they do not control because he only challenges the constitutionality of the murder instruction and not the voluntary manslaughter instruction. Brief in Opposition, p. 8. The murder charge by itself, however, was perfectly constitutional; it required the State to prove, beyond a reasonable doubt, all the ele-

ments of the offense. As the Seventh Circuit has repeatedly explained, the murder and voluntary manslaughter instructions "were fine when read separately." *Taylor*, 954 F.2d at 450 (citing *Falconer*, 905 F.2d at 1135).

Only the addition of the voluntary manslaughter issue made the instructions incorrect because, taken together, the instructions did not tell the jury the significance of the voluntary manslaughter evidence. *Taylor*, 954 F.2d at 452-53. Flowers is simply wrong, therefore, to argue that "it was [only] the murder instruction which the Seventh Circuit held unconstitutional." Brief in Opposition, p. 8.

III.

THE LAW PERMITS THE DEPARTMENT TO RAISE THE FIRST QUESTION PRESENTED IN THE PETITION FOR CERTIORARI EVEN THOUGH THE ISSUE WAS NOT RAISED IN EARLIER CASES.

Flowers argues essentially that the Court should not grant certiorari on the first question presented in the Petition because the law collaterally estops the Department from raising the question. Flowers's argument conflicts with long-accepted principles of collateral estoppel, so the Court should reject it.

Flowers argues that the State of Illinois elected not to raise, in certain earlier cases, the legal issue of whether *Falconer* applies retroactively on habeas corpus review. He concludes that the Court should not grant certiorari to resolve the question in this case even though the question of retroactivity was raised and resolved on its merits in this case in the federal district court and the Seventh Circuit.

A litigant has no obligation, however, to raise every available legal issue in every lawsuit. The Court has re-

peatedly held that collateral estoppel does not bar litigation of an issue that a party could have presented in an earlier case but elected not to raise for whatever reason. *See, e.g., Goldblatt v. Town of Hempstead*, 369 U.S. 590, 597 (1962) (Goldblatt's victory in the first suit brought on one ground did not bar the town from presenting a different theory of recovery in a later suit); *Mercoid Corp. v. Mid-Continent Inv. Co.*, 320 U.S. 661, 669-70 (1944) (election not to raise a defense in an earlier action did not preclude raising it in a later suit); 1B JAMES W. MOORE, JO D. LUCAS & THOMAS S. CURRIER, MOORE'S FEDERAL PRACTICE ¶ 0.443[3], at 773 (2d ed. 1991) (when a defendant elects not to raise a defense, judgment for the plaintiff is res judicata for the plaintiff's cause of action, but "it does not conclusively establish the absence of the defense for collateral purposes.").

Furthermore, the logic of Flowers's argument would lead to absurd results. Flowers would have this Court forever foreclose the possibility of certiorari review of an issue just because a party did not raise the issue in the first possible case that permitted it. A party, however, should have discretion to decide not to raise an issue without worrying that it might be foreclosed from presenting it to this Court in a later, unrelated case. Parties, especially state parties in habeas corpus cases, decide what issues to raise in lawsuits based on many different considerations; the law of collateral estoppel should not compel them to raise every possible issue in every case.

Moreover, Flowers's secondary argument, that applying *Teague* to *Falconer* would violate *Teague's* policy of treating similarly situated defendants the same, is puzzling at best. *Teague* indeed states that the retroactivity doctrine should treat similarly situated prisoners the same. 489 U.S. at 304. The various state respondents' decisions

not to press a *Teague* claim in some earlier *Reddick* error habeas corpus cases, however, did not alter this policy of the retroactivity doctrine. The *law* still treats similarly situated habeas petitioners similarly; those earlier state respondents simply did not assert all their legal rights.

Flowers also suggests that "[g]ranting this petition would open the door to a defendant's claim that the State had an 'improper motive' in singling him out for a *Teague v. Lane* claim." Respondent's Brief in Opposition, p. 11. *Wade v. United States*, 112 S. Ct. 1840 (1992), however, suggests the opposite result. In *Wade*, the Court held that Wade had made no "substantial threshold showing" that the government had violated his constitutional rights by refusing to seek a downward departure from the federal sentencing guidelines based on an improper motive. 112 S. Ct. at 1844. Even if a state employee can violate a habeas petitioner's constitutional rights by asserting a *Teague* defense based on an improper motive (which this Court has apparently never held), Flowers, like Wade, has presented no substantial threshold showing that the Department acted with any improper motive.

Next, Flowers cites *Penry v. Lynaugh*, 492 U.S. 302 (1989), to argue that Judge Easterbrook's concurrence and the conflicting decisions from other circuits do not illustrate the novelty of the holding below. Preliminarily, Flowers does not dispute the Petition's discussion of Judge Easterbrook's concurrence or the circuit split on this aspect of the Due Process Clause; he only argues that "disagreement on the constitutionality of a certain procedure . . . does not necessarily establish that a constitutional rule is new." Brief in Opposition, p. 12. Flowers does not contest that a disagreement exists.

Reasonable disagreement, like that over the scope of the Due Process Clause in the *Reddick* cases, indeed re-

quires a court to find the rule "new" under *Teague*. *Sawyer v. Smith*, 110 S. Ct. at 2827. The extensive judicial disagreement in the *Reddick* cases is much more reasonable than that presented by the lower courts in *Penry*. In *Penry*, this Court merely applied an existing constitutional principle to the specific facts of Penry's case. 492 U.S. at 314-19. By contrast, the decision below and *Taylor* apply a rule that has caused extreme confusion in the courts, that other circuits have explicitly rejected, and that may well be wrong under this Court's precedent. As Justice Scalia wrote in *Penry*, "[i]t seems . . . utterly impossible to say that a judge acting in good faith and with care should have known the rule" applied below. 492 U.S. at 353 (Scalia, J., concurring in part and dissenting in part). The reasonableness of the judicial disagreement—not its mere existence—renders the *Taylor* holding new under *Teague*.

•

Finally, Flowers correctly notes that *Teague* still permits retroactive application of "watershed rules of criminal procedure" even if they are "new." *Teague*, 489 U.S. at 311 (1989). Contrary to Flowers's argument, however, neither *Taylor* nor *Falconer* announced such a fundamental principle. At most, these decisions apply *In re Winship*, 397 U.S. 358 (1970), to a new factual setting. *Winship* held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.* at 364. *Falconer* and *Taylor* expand that holding to include facts relating to affirmative defenses. If any case established a watershed rule of criminal procedure relating to the Due Process Clause's requirements for burdens of proof and elements of crimes, *Winship* did so, not *Falconer* or *Taylor*. *See Sawyer v. Smith*, 110 S. Ct. at 2831-33 (proposed rule did not meet

this *Teague* exception because, even though it would improve trial accuracy, it would not " 'alter our understanding of the *bedrock procedural elements*' essential to the fairness of a proceeding.") (quoting *Teague*, 489 U.S. at 311).

CONCLUSION

The Brief in Opposition presents no sound reason to deny a writ of certiorari on the first question presented in the Petition. This Court should grant the writ.

Respectfully submitted,

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